

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF JOSEPH A. CLOCK, by JEANETTE
A. CLOCK, Personal Representative,

UNPUBLISHED
July 19, 2011

Plaintiff-Appellant,

V

NEAL KEMP and SUSAN KEMP,

No. 296596
Kalamazoo Circuit Court
LC No. 2009-000141-NO

Defendants-Appellees.

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

SHAPIRO, P.J. (*dissenting*).

Because I conclude that there is a question of fact as to negligence, I respectfully dissent. In addition, I believe that the majority acts imprudently by sua sponte refusing to consider deposition testimony that was presented to the trial court, on the grounds that the transcript cannot be found in the trial record transmitted to the clerk of this court.

It is undisputed that the duty of a landowner to passersby on a public street is to “exercise ordinary care in maintaining his . . . premises in a reasonably safe condition in order to prevent injury to persons traveling along an adjacent . . . sidewalk” M Civ JI 19.09 [brackets and italics omitted; cited supporting authorities in commentary are *Grimes v King*, 311 Mich 399; 18 NW2d 870 (1945) and *Parsons v E I Du Pont De Nemours Powder Co*, 198 Mich 409; 164 NW 413 (1917)]. Plaintiff maintains that, in order to act within that duty, defendant should have had the tree inspected after the prior collapse of a large stem, which like the stem that killed the plaintiff’s decedent was about 12 to 16 inches in diameter and as long as a bus. Plaintiff asserted that, had the tree been inspected, the poor attachment alleged to have caused the instant collapse would have been discovered and remedied. Plaintiff’s expert testified in support of those claims at deposition. He testified that the earlier collapse was a “warning bell to the owners to have the tree examined by a competent arborist” and that had that occurred, the recommendation would have been “to take the tree down or possibly . . . reinforce the main stems together with a cable.”

The majority avoids the obvious question of fact created by that testimony by declining to consider it on the grounds that relevant deposition pages are not found in the lower court record transmitted by the trial court clerk to this Court. I think it is error not to consider that testimony. Plaintiff’s brief below quoted the same text from the expert’s deposition and the trial court’s opinion referred to the testimony of plaintiff’s expert. Thus, those facts are part of the lower

court record and this Court *must* consider them in its de novo review of plaintiff's appeal. See *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 377-378; 775 NW2d 618 (2009).¹

Defendant did not assert at the trial court that the testimony of plaintiff's expert should not be considered or that the quotations from it were inaccurate or out of context. Defendant neither asked us to strike the quoted testimony set forth in plaintiff's brief on appeal, nor asked that we strike the transcript of the expert's testimony attached to plaintiff's brief. Defendant has plainly recognized that the material was fairly and accurately presented to the lower court and I see no reason why this Court should hold otherwise. Had defendant moved to strike and plaintiff had been unable to demonstrate that the deposition testimony was properly presented to the trial court, I would agree that it should be stricken. However, by raising the issue sua sponte, this Court makes a finding, i.e. that the testimony is not in the record, that essentially decides the case without ever having allowed plaintiff to dispute that finding. Resolving a wrongful death lawsuit on such a basis does little for the public's view of our justice system.

/s/ Douglas B. Shapiro

¹ In addition, the majority relies upon the opinion of *defendants'* expert to conclude that, contrary to plaintiff's position, it was reasonable not to conduct an inspection after the prior limb collapse. In so doing, the majority has wholly inverted the summary disposition standard by concluding that the mere presence of evidence contrary to plaintiff's theory provides a basis for a grant of summary disposition to the defense.